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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1957.

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, ADMINISTRATOR d.b.n. OF THE ESTATE OF JOSEPH KELLY KERR, DECEASED, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The district court filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a-7a) is reported at 240 F. 2d 863.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1956 (Pet. App. 4a). A petition

for rehearing, timely filed, was denied on February 25, 1957, (R. 22).

The time within which to file a petition for a writ of certiorari was extended to and including June 25, 1957 by Chief Justice Warren on May 12, 1957. The petition for a writ of certiorari was filed on June 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction to entertain this suit on a judgment against the United States, where the complaint showed on its face that it was brought more than six years after the entry of the judgment.

2. Whether the United States has consented to be sued on this judgment.

3. Whether a suit on a judgment against the United States, which raises no question not already concluded by prior litigation, states a claim on which relief can be granted.

STATEMENT

Petitioner instituted this suit in the District Court for the District of Columbia on December 4, 1954, to obtain a judgment against the United States in the amount of $7,404.75 (R. 1). The basis for the suit was an outstanding unpaid judgment against the United States obtained in a prior suit on a policy of war risk insurance. (For the background of this litigation, see *United States* v. *Citizens Loan Co.*, 316 U.S. 209.) The complaint alleged that the prior

judgment, dated June 30, 1942, awarded $7,404.75 to the petitioner and $822.75 to Camden R. McAtee for legal services, and that the amount payable to the petitioner remained unpaid (R. 23). The record does not disclose why the judgment has not been paid.

On February 7, 1955, the United States moved to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 4). The motion was granted on March 8, 1955 (R. 6). A motion for rehearing (R. 6) was denied on March 30, 1955 (R. 6).

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the decision was affirmed *per curiam* (Pet. App. 4a-7a). The court ruled that the suit was properly dismissed for failure to state a claim on which relief could be granted, because the petitioner sought only a reaffirmation of his first judgment (Pet. App. 5a). A motion for rehearing was denied on February 25, 1957 (R. 22).

ARGUMENT

1. The District Court lacked jurisdiction to entertain the instant suit because the complaint showed on its face that it was barred by limitations. Suit was brought against the United States pursuant to 28 U.S.C. 1346(a).[1] 28 U.S.C. 2401 requires that suit be filed within six years from the time the right of action accrues. The judgment on which this suit is brought was entered on June 30, 1942 (R. 2). Except

[1] 28 U.S.C. 1346 is relied on in the complaint to establish district court jurisdiction (R. 2).

as to the allowance of attorney fees, which were paid, the complaint alleges that there has been a consistant and continuing refusal to pay the 1942 judgment. The instant complaint, however, was not filed until December 4, 1954, over twelve years after the entry of judgment. Thus, it is clear on the face of the complaint that suit was brought more than six years after the entry of the original judgment and is barred by the jurisdictional statute of limitations,[2] irrespective of whether the action be regarded as one on a judgment or a wrongful refusal to pay the judgment. The petition makes no reference to this obvious bar to suit.

2. A second jurisdictional objection to the maintenance of this suit is that the United States has not consented to be sued on the judgment.[3] It is elementary that the sovereign may not be sued without its consent, and 28 U.S.C. 1346 fails to include judgments among the classes of actions to which the United States has consented.

Petitioner appears to suggest (Pet. 9) that consent to suit on a judgment on a War Risk Insurance policy may be found in 38 U.S.C. 442,[5] which ap-

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[2] *Munro* v. *United States*, 303 U.S. 36; *Finn* v. *United States*, 123 U.S. 227.

[3] The Court of Appeals noted that "doubt appears as to whether the Government has consented to be sued on the 1942 judgment" (Pet. App. 5a).

[4] *Soriano* v. *United States*, 352 U.S. 270; *United States* v. *Sherwood*, 312 U.S. 584; *United States* v. *Shaw*, 309 U.S. 495.

[5] Act of June 7, 1924, 43 Stat. 612 (Pet. App. 1a).

propriates funds out of which such judgments may be paid. However, as the Court of Appeals correctly pointed out, that section is not a specific appropriation to pay a judgment already entered, but is the designation of a general fund for the payment of war risk insurance benefits and claims, including judgments (Pet. App. 5a). As such, it does no more than corroborate Congressional intention to grant jurisdiction over suits on war risk insurance policies, a jurisdiction which is specifically granted in 38 U.S.C. 445.[6] Because 38 U.S.C. 442 is a general appropriation made prior to the entry of judgment, it cannot be said to constitute a consent to a suit on a specific later judgment. This fact distinguishes the instant case from *Benedict* v. *United States*, 66 C. Cls. 437, which petitioner erroneously asserts conflicts with the instant decision, inasmuch as there a specific appropriation was made after the entry of judgment for the purpose of satisfying it.[7]

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[6] Act of June 7, 1924, 43 Stat. 612 (Pet. App. 1a). Petitioner neither alleges nor relies upon this section as conferring jurisdiction on district courts to entertain suits on judgments.

[7] In *Benedict*, the Court of Claims stated:

> * * * the court will take judicial notice that a specific appropriation was made by the act approved April 2, 1924 (Public No. 66, 68th Cong.), to pay the judgment upon which suit is brought, and certain other judgments, "together with such additional sums as may be necessary to pay interest thereon at the legal rate per annum as and where specified in said judgments."
>
> It thus appears that there was a special fund set aside by Congress for the payment of this judgment, together with interest according to its terms. * * * [66 C. Cls. 437, 443.]

3. Finally, the instant suit must be dismissed for failure to state a claim on which relief can be granted, since the complaint seeks nothing more than a reaffirmation of a prior judgment. The sound public policy behind dismissing a suit on a judgment against the United States which puts in issue no question not already concluded by prior litigation is obvious. The instant litigation would, if allowed, adjudicate nothing and would leave the plaintiff with a judgment that would be of no more value to it than the one which formed the basis for its suit. There is no more reason to suppose that a new judgment will be paid than that the original judgment will be paid.

Congress has provided a specific procedure for the payment of judgments rendered against the United States in the district courts. 28 U.S.C. 2414. An analogous procedure for the payment of judgments rendered in the Court of Claims is set out in 28 U.S.C. 2517. Specific provision is also made for setting off debts owed to the United States against such judgments, as well as for judicial determination of the propriety of such set-offs. 31 U.S.C. 227. If the proper official fails to pay the judgment when this procedure is followed, an action in the nature of mandamus will lie in appropriate cases to compel the official to honor the judgment. *Hines* v. *United States*, 105 F. 2d 85 (C.A.D.C.). In the face of this procedure for the payment and enforcement of judgments against the United States, it is clear that the normal procedures open to a plaintiff to realize the full benefit of a private judgment are not available against the

United States. A judgment on a judgment, normally available against a private party, loses all significance when sought against the Government, for in no way does it improve the plaintiff's position. As the Court of Appeals stated: "Petitioner seeks nothing more than a reaffirmation of his first judgment" (Pet. App. 5a).

In the only other suit we have found on a judgment against the United States which put in issue no question not already concluded by the prior judgment, the Court of Claims dismissed the petition. *Hetfield* v. *United States*, 78 C. Cls. 419.[8] One of the alternative grounds in that case for dismissing the petition was that no issue not already litigated had been raised. The suit was considered to be vexatious, "seeking nothing beneficial to the plaintiff and being merely an annoyance to the defendant" (*Id.* 422). In this same case, the Court of Claims distinguished its own decision in *Benedict* v. *United States*, *supra*, the distinction being the same as that made by the Court of Appeals in the instant case,[9] namely that in *Benedict* "there was a controversy as to the interest to be paid upon the judgment and for this reason payment had been delayed". *Hetfield* v. *United States*, *supra*, 421. Thus, an issue not previously litigated

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[8] See also *Daniel* v. *United States*, 78 C. Cls. 831, where the petition was dismissed without a statement of facts or opinion, on the authority of the *Hetfield* case, *supra*.

[9] In the instant case, the Court of Appeals noted that "in *Benedict* there was a dispute as to the amount of interest due on the initial judgment" (Pet. App. 6a).

was raised over which the court had jurisdiction.[10] The *Benedict* case, when viewed in the light of its subsequent interpretation by the Court of Claims, serves only to support the proposition that a complaint which seeks nothing more than a reaffirmation of a prior judgment must be dismissed.

Petitioner also relies on this Court's opinions in *United States* v. *O'Grady*, 22 Wall. 641, affirming 8 C. Cls. 451, and *United States* v. *Weld*, 127 U.S. 51, affirming 23 C. Cls. 126. But in both of those cases, the suit on the judgment raised for the first time the validity of a set-off. Thus, these cases merely sought a ruling adjudicating the propriety of the set-off.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[10] This difference also makes inapplicable to the instant case a series of Court of Claims cases which have permitted suit. *Eastport Steamship Co.* v. *United States*, 131 C. Cls. 210; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 713; *James Stewart & Co.* v. *United States*, 71 C. Cls. 126; *Brown* v. *United States*, 6 C. Cls. 171.

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